



Australian Government

Australian Law Reform Commission

Review of Secrecy Laws

INQUIRY SNAPSHOT

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Review of Secrecy Laws

Inquiry Snapshot

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The ALRC's Secrecy Inquiry

The Attorney-General of Australia, the Hon Robert McClelland MP, has asked the Australian Law Reform Commission (ALRC) to review Australia's secrecy laws and to make recommendations about ways in which they could be improved. Central to the decision to initiate the ALRC inquiry was the need to balance the legitimate public interest in protecting some information from disclosure against the need to maintain an open and accountable government. A key component of this task is ensuring a consistent approach across the Australian Government to the protection of Commonwealth information.

The ALRC is due to present its final Report to the Attorney-General by 31 October 2009. The full Terms of Reference are available at www.alrc.gov.au/inquiries/current/secrecy/terms.html.

Setting the scene

The collection and disclosure of information is essential for the proper functioning of government. Picture a situation where a customs control officer discovers a traveller entering Australia with explosive material. Australians would reasonably expect this information to be shared with (at a minimum) law enforcement agencies and agencies

responsible for national security. It may be, however, that it is not appropriate to put this information into the public arena, at least while any investigation is ongoing.

Where individuals provide personal information to a government agency—for example, to allow the agency to assess their tax obligations or entitlement to social security—they expect the information to be given appropriate protection. This sort of information may never be put into the public arena.

On the other hand, there is a general expectation in the community that government information and activities will not be shrouded in secrecy, unless absolutely necessary. Openness in government helps to ensure that government is accountable to the public for its actions, policies and decisions.

Secrecy laws are not the only laws that regulate the collection and disclosure of government information. Freedom of information laws provide members of the public with a right to seek access to many government documents. Privacy laws protect personal information about individuals, and regulate how that information can be collected, stored, used and disclosed. Privacy laws also allow a person to obtain access, and make corrections, to information that the government holds about him or her. Government information may also be protected from disclosure by the duty of fidelity and loyalty that public servants owe to their employers under their contract of employment, or under the law relating to breach of confidence.

The ALRC has been asked to examine federal secrecy laws to ensure that an appropriate balance is drawn between the need to protect certain information, and the need to ensure effective, open and accountable government. The ALRC must consider the need to share information within and between governments, with the private sector, and with the general public, and must also consider any potential harm that may result from the disclosure of sensitive government information.

What are ‘secrecy laws’?

‘Secrecy laws’ often state that certain information must not be *disclosed*. But other activities—such as copying, using, obtaining or soliciting information—may also be covered. The common thread of these provisions is their focus on protecting the secrecy or confidentiality of information by imposing criminal liability on individuals who mishandle it. There are quite a few of these provisions on the Commonwealth statute book. The ALRC has identified 450—and the number is still going up—as a thorough map of them is constructed. Some are ‘general’ provisions; others target specific types of information.

General provisions

Some secrecy provisions apply to Commonwealth information generally—like those in the *Crimes Act 1914*: s 70—a general prohibition against the unauthorised disclosure of official information by Commonwealth officers; and s 79—which deals with the unauthorised communication of ‘official secrets’.

The ALRC is examining whether such general criminal offences are useful and, if so, how they should be worded.

Specific provisions

Many other secrecy provisions are more particular and focus on the unauthorised handling of one or more specific *types* of Commonwealth information, such as: personal information; taxation information; electoral information; defence or security information; and Indigenous sacred or sensitive information.

The ALRC wants to hear views about the types of information that should be protected by secrecy laws and the best ways of achieving that protection.

A public interest requirement?

Some—but by no means all—secrecy provisions also expressly require that the unauthorised conduct cause, be likely to cause, or be intended to cause harm to a particular public interest. For example, an element of the offence contained in s 58 of the *Defence Force Discipline Act 1982* is that the disclosure of information ‘is likely to be prejudicial to the security or defence of Australia’.

What is in the ‘public interest’ may involve balancing many different public interests. In the context of law enforcement, for example, the public interest in open government may conflict with the public interest in increasing the chances of catching the perpetrator of a crime by keeping law enforcement intelligence secret.

A key issue for the ALRC in this Inquiry will be finding a way to define and balance the relevant public interests.

What is ‘Commonwealth information’?

The ALRC’s Secrecy Inquiry centres on the protection of ‘Commonwealth information’ (which may also be called ‘government information’ or ‘official information’). This includes:

- information the Commonwealth receives from individuals or organisations (such as personal information provided to an agency like Centrelink);
- information developed by the Commonwealth government itself (for example, intelligence reports); and
- information generated by foreign governments that is shared with the Commonwealth government.

Who is caught by secrecy laws?

Commonly, secrecy provisions regulate the conduct of Australian Public Service employees and other Commonwealth officers (such as members of the Australian Federal Police and the Australian Defence Force and persons performing services by or on behalf of the Commonwealth). Other secrecy provisions extend to a wider range of individuals, including: consultants; those who provide other goods and services to the

Australian Government; and even state and territory or local government employees. Some provisions also apply to individuals working in federally regulated areas of the private sector, such as aged care and financial institutions.

Particularly in the areas of defence and security, secrecy provisions sometimes regulate the activities of *any* person who comes into possession or control of documents or information—including members of the media.

Secrecy provisions may apply not only to persons who have access to Commonwealth information because of their current position, but also to those who may have had access in the past but no longer have access, such as former employees of Commonwealth agencies.

What activities are caught?

Secrecy laws regulate a range of activities including: disclosing, divulging or communicating information; soliciting or receiving information; making a record of information; and using information.

Most secrecy laws regulate the initial unauthorised handling of Commonwealth information, such as the disclosure of information by a Commonwealth officer to a second person. Some secrecy laws also regulate subsequent unauthorised handling—for example, the further or secondary disclosure of that information by the second person to some other ('third') person.

Secondary disclosures

Under the *Agricultural and Veterinary Chemicals Code Act 1994* it is an offence for staff of the Australian Pesticides and Veterinary Medicines Authority to disclose certain information acquired in the course of their duties about the active constituents for proposed or existing chemical products that the staff member knows to be confidential commercial information.

Where the staff member discloses such information to someone else, the Act provides that it is an offence for that person, or anyone under the control of that person, to subsequently disclose the information if he or she knows that it is confidential commercial information. In this case the initial disclosure of information by the staff member may have been unauthorised, as well as the subsequent disclosure by the second person to a third party.

Exceptions and defences

Secrecy laws usually provide a range of exceptions and defences. An *exception* limits the conduct that is prohibited by a secrecy law. A *defence* may be relied on by a person whose conduct is prohibited by a secrecy law.

Common exceptions and defences found in secrecy laws include: information handling in the performance of a person's functions or duties, or as required or authorised by law; information handling for the purposes of court or tribunal proceedings, or for the purpose of law enforcement; disclosure of information with the consent of the person to whom the information relates, or that has been de-identified; and information handling where it averts threats to life or health.

The ALRC is considering what exceptions and defences should be incorporated in secrecy laws, including any general Commonwealth secrecy law.

Public interest disclosure

What about disclosing information that highlights wrongdoing, such as corrupt government conduct? Should this be allowed? Should a person who reveals such wrongdoing be protected? Public interest disclosure (or 'whistleblower') legislation aims to support public interest whistleblowing by encouraging such disclosures, and may provide a defence for breach of a secrecy provision.

Currently there is only limited protection available for public interest disclosures in Commonwealth legislation. The *Public Service Act 1999* prohibits victimisation of or discrimination against Commonwealth officers who report breaches of the Australian Public Service Code of Conduct, but this provision does not protect officers against criminal liability.

The House of Representatives Standing Committee on Legal and Constitutional Affairs is currently considering a model for possible new public interest disclosure legislation. This review is expected to report on the type of information that should be covered by such legislation, the categories of person to whom it should apply, and the circumstances in which disclosures should be covered.

Penalties and enforcement processes

Criminal penalties

Secrecy laws usually include criminal penalties. The ALRC is considering whether this is appropriate in every case, given the nature of the information; the intent of the offender; the seriousness of the breach; and the damage caused to the public interest. The ALRC is also examining how these penalties should be determined. Currently, there is wide variation in the maximum penalties that can be imposed for breach of secrecy laws.

Variation in maximum penalties

Different secrecy offences carry quite different maximum penalties for similar conduct:

- The unauthorised disclosure of personal information attracts a low-level fine of \$550 in some cases, and in others two years imprisonment and a fine of \$13,200.

- The unauthorised disclosure of information about the identity of a person in the national witness protection program carries a maximum penalty of 10 years imprisonment, whereas publishing information that discloses the identity of an agent or officer of the Australian Security Intelligence Organisation carries a maximum penalty of imprisonment for one year—even in circumstances where such publication could endanger the life of that agent or officer.

Not all suspected breaches of secrecy offences will necessarily result in criminal proceedings. Whether to commence a criminal *investigation* into a suspected breach is usually a decision of the Australian Federal Police in accordance with the *Case Categorisation and Prioritisation Model*. Whether to instigate a *prosecution* of a suspected breach is a decision of the Office of the Commonwealth Director of Public Prosecutions in accordance with the *Prosecution Policy of the Commonwealth*.

For a small number of secrecy offences—often associated with national security—the Attorney-General of Australia must provide his or her consent before a prosecution can commence.

Prosecutions for breaches of secrecy provisions

There have been a number of prosecutions for breaches of s 70 of the *Crimes Act*. For example, the provision has been used to prosecute:

- a member of the Australian Federal Police (AFP) for disclosing information held in AFP files to a private business associate;
- an officer of the Australian Taxation Office (ATO) for providing client lists compiled from information obtained by use of the ATO's compulsory powers to a private business associate for use in marketing;
- an officer of the Australian Customs Service for providing reports about security at Sydney Kingsford Smith Airport to journalists; and
- an officer of the Office of Indigenous Policy Coordination for disclosing information relating to the then draft *Declaration on the Rights of Indigenous Peoples* to her daughter, and information relating to Commonwealth Indigenous policy to a member of the Mutitjulu community.

Administrative penalties

Outside the court arena, administrative penalties may be imposed directly by an agency for a breach of secrecy provisions. Under the *Public Service Act*—which applies to

many Commonwealth officers—potential penalties include: termination of employment; reduction in employment classification; re-assignment of duties; reduction in salary; a fine, not to exceed 2% of the employee’s annual salary; and a reprimand. In some situations the employee may also be suspended from duty.

Many Commonwealth officers—including those who handle some of the most sensitive Commonwealth information—are not employed under the *Public Service Act*. These include members of the Australian Defence Force, the Australian Federal Police, the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service. Different administrative penalty regimes are set out in the legislation governing employment in each of these agencies.

Administrative penalties only apply to current Commonwealth officers. They cannot be imposed on former Commonwealth officers, or persons in the private sector who may have access to Commonwealth information. Where administrative penalties are not available, the consequence may be that the conduct is *only* punishable by criminal penalties.

The ALRC is interested in views on whether there are some secrecy provisions that should only give rise to administrative—not criminal—penalties. It is also considering whether there is a way of addressing the gap in those situations where administrative penalties aren’t available for breach of a secrecy provision.

Getting involved

The ALRC Issues Paper 34, *Review of Secrecy Laws*, (IP 34) contains 63 questions seeking input on the issues discussed above. The ALRC has also set up an interactive website for the ALRC’s review of secrecy laws. Here you will find information about the Secrecy Inquiry and a place where you can have your say by participating in the *Talking Secrecy* online forum.

IP 34 and further information about this Inquiry are available from the ALRC website <www.alrc.gov.au>. The closing date for written submissions in response to the Issues Paper is 19 February 2009. When the Discussion Paper is released in late May, there will be another chance to make submissions.

The ALRC welcomes any submissions or comments on its review of secrecy laws